

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

February 20, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1082

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

NORMAN MEKA,

Plaintiff-Appellant,

v.

**CITY OF MILWAUKEE ANNUITY AND PENSION
BOARD and ROBERT G. NEHLS, SECRETARY AND
EXECUTIVE DIRECTOR FOR THE CITY OF
MILWAUKEE ANNUITY AND PENSION BOARD,**

Defendants-Respondents.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: FRANK T. CRIVELLO, Judge. *Affirmed.*

Before Wedemeyer, P.J., Sullivan and Fine, JJ.

PER CURIAM. Norman Meka appeals from a judgment and order of the circuit court affirming a decision by the City of Milwaukee Annuity and Pension Board that denied him duty disability benefits. The judgment and order of the circuit court are affirmed.

Meka was employed by the City of Milwaukee Sanitation Department as a sanitation worker for approximately twenty-five years until an injury forced him to terminate his employment in 1992. In 1970, Meka, on military leave from his job with the Sanitation Department, sprained his right knee and received a permanent disability rating from the military. After completion of his military service, Meka returned to the Sanitation Department. On January 12, 1978, Meka suffered a back injury while on the job. At that time, Meka received treatment from Dr. Michael Collopy for the back injury but continued working. On January 16, 1992, Meka suffered another injury to his back while working for the Sanitation Department. He saw Dr. Collopy for treatment again. Dr. Collopy issued work restrictions and stated that Meka had reached his ultimate point of healing. Based upon Dr. Collopy's conclusion, Meka filed an application for retirement benefits with the Board. Meka was referred to Dr. Robert McCabe for an independent medical examination to determine the extent of his injuries. Dr. McCabe opined that based upon his physical examination, Meka suffered from degenerative arthritis in both his lumbar spine and right knee and that such disabilities were not work-related. He also concluded that Meka was not permanently and totally disabled.

A hearing was held before an administrative law judge. At the hearing, Meka testified and presented medical records including an affidavit of Dr. Collopy that indicated that Meka's injuries were work-related and that he was permanently and totally disabled. The Board countered with Dr. McCabe's report, which indicated that Meka's injuries were not work-related but were degenerative in nature and that Meka was not permanently and totally disabled.

The administrative law judge determined that Meka was not totally and permanently disabled because of a work injury and that the evidence did not support a determination that Meka was entitled to duty disability benefits. The administrative law judge based this conclusion on his determination that Meka "could perform" work other than his duties as a sanitation worker. The Board remanded the administrative law judge's decision, pointing out that the test was whether Meka could "perform the usual duties of the position held at the time of the duty related injury." The administrative law judge revised his decision to again deny benefits. The Board adopted the administrative law judge's decision, and Meka appealed the determination to the circuit court by writ of certiorari. The circuit court upheld the determination of the Board.

On appeal, Meka argues that the Board's denial of benefits was contrary to the substantial evidence contained in the record. Also, Meka contends that the denial of benefits represents the Board's will – not its reasoned judgment. Finally, Meka argues that there were inconsistencies between the administrative law judge's decision and his follow-up letter to the Board that set out his revised decision. We disagree.

On review of a judgment entered on certiorari, this court's function is to review not the judgment or findings of the trial court but, rather, to review the record before the administrative agency. *State ex rel. Harris v. Annuity & Pension Bd.*, 87 Wis.2d 646, 651, 275 N.W.2d 668, 671 (1979). Where a petitioner challenges the Board's decision as arbitrary and unreasonable and representing its will and not its judgment, the test is whether the Board “has acted without a rational basis or the exercise of discretion.” *State ex rel. Ruthenberg v. Annuity & Pension Bd.*, 89 Wis.2d 463, 473, 278 N.W.2d 835, 839-840 (1979). Where a petitioner argues that the denial of benefits was contrary to the substantial evidence contained in the record, this court “must evaluate the evidence, which has been determined to be credible and accepted by the trier of the fact[,] to see if its sufficiency reaches that degree of substantiality in terms of burden of proof to support a finding or of convincing power that reasonable men acting reasonably might reach the decision the administrative agency did.” *State ex rel. Beierle v. Civil Service Comm'n*, 41 Wis.2d 213, 218, 163 N.W.2d 606, 608 (1969) (citation omitted); see ch. 227, STATS.

Milwaukee City Charter § 36-05-3-a provides:

.... Any member in active service who shall become permanently and totally incapacitated for duty as the natural and proximate result of an injury occurring at some definite time and place while in the actual performance of duty shall, upon filing a request for retirement with the board on a form provided by the board for that purpose, be entitled to a duty disability retirement allowance....

In his application for duty disability retirement and statement of disability to the Employer's Retirement System, Meka states that he cannot return to his

position at the Sanitation Department as a result of two separate back injuries; one occurring on January 12, 1978, and the other on January 16, 1992. Meka also refers to the condition of his right knee as a further basis for duty disability.

Regarding the January 12, 1978, back injury, it is undisputed that Meka sustained a back strain while in the course of his employment with the Sanitation Department. After being off work for approximately eight months, Meka returned to work full-time without further injury until January 1992. The record reflects that Meka fully recovered from the January, 1978, incident because he performed full-time duty with the Sanitation Department for the next 14 years. Therefore, this injury did not result in Meka's permanent and total incapacitation for duty as contemplated by § 36-05-3-a of the Milwaukee City Charter.

As noted, Meka injured his back again on January 16, 1992, while lifting a garbage can on the job. After an examination by Dr. Collopy, Meka's treating physician, Dr. Collopy recommended that Meka apply for duty disability benefits because of his back injuries. It was Dr. Collopy's opinion that the back injury was work-related and that Meka had reached a healing plateau. At the Board's request, Meka was also examined by Dr. McCabe for an independent medical examination of his injuries. Dr. McCabe opined that the back condition was due to pre-existing advanced degenerative arthritis and was not the result of the work injuries. The administrative law judge chose to discount the opinion of Dr. Collopy. As the administrative law judge is the judge of the credibility of the witnesses, we cannot say that its rejection of Dr. Collopy's finding was in error. See *Bucyrus-Erie Co. v. DILHR*, 90 Wis.2d 408, 418, 280 N.W.2d 142, 147 (1979).

Regarding the right knee injury, it should be noted that a specific date of injury to his right knee was not identified by Meka on the statement of disability or the application for disability. Therefore, Meka has not reported a knee injury "occurring at some definite time and place while in the actual performance of duty" as required by § 36-05-3-a of the Milwaukee City Charter.

Finally, Meka argues that there was an inconsistency between the administrative law judge's decision and his revised decision. We note that in the administrative law judge's findings of fact, he cited Dr. McCabe's conclusion

that Meka's disability was not the result of his employment, but rather the result of a pre-existing degenerative condition. In his Conclusions of Law, the administrative law judge determined that Meka had not met the criteria set forth in § 36-05-3-a of the Milwaukee City Charter. In his follow-up letter to the Board containing his revised decision, the administrative law judge cites Dr. McCabe's report as the basis for the denial of benefits. Although we are troubled by what may, at first blush, look as though the administrative law judge merely "repaired" his earlier decision in order to reach a desired result, the evidence in the record supports the Board's determination. Accordingly, under our standard of review, we must affirm.

By the Court. — Judgment and order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.